

No. 89-1568

Supreme Court, U.S.
FILED

MAY 10 1990

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IN THE

Supreme Court of the United States

October Term, 1989

ARTHUR CHAMBLESS and MILDRED H. CHAMBLESS,

Petitioners,

against

MASTERS, MATES & PILOTS PENSION PLAN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Brief in Opposition to a Petition for a Writ of Certiorari

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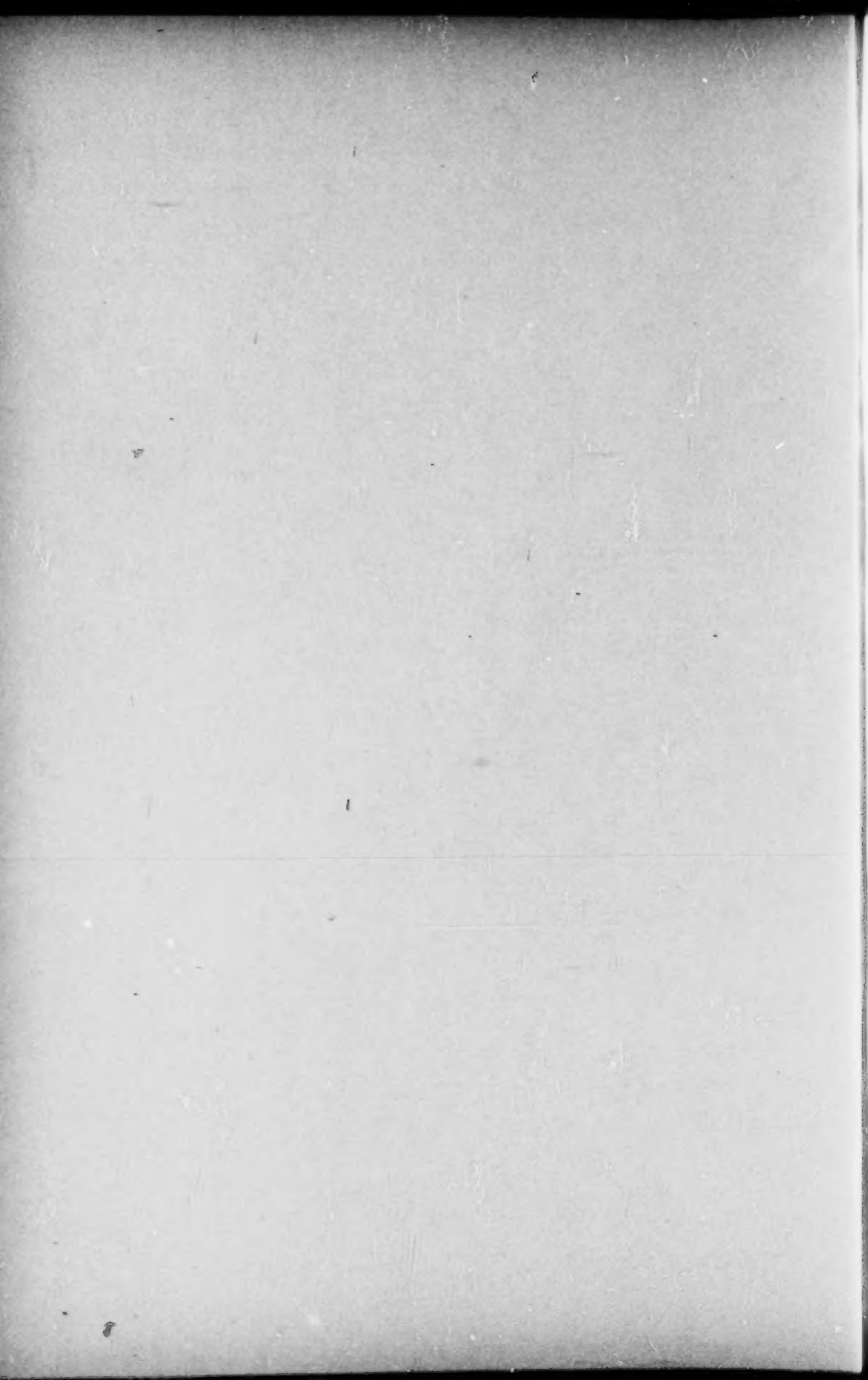
Pension Plan, Maher and M. M. & P.

Pension Plan Trustees

Of Counsel:

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QUESTIONS PRESENTED

1. Whether merely because they are labelled as an "actuarial adjustment" should retroactive benefits be paid to petitioner when the District Court and the Court of Appeals have both held that petitioner is not entitled to retroactive benefits.

2. Is fee parity between opposing counsel required in ERISA cases where the result will be that petitioners' attorney will thereby receive a "windfall" and the fee paid to petitioners' attorney would not be based on appropriate prevailing market rates for such attorney.

3. Should interest be added to petitioners' attorneys' fee award to compensate for delayed payment where the hourly rates awarded by the District Court were "sufficiently generous" to compensate for any delay and the case would have been

completed in far less time but for the manner in which petitioners prosecuted it.

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STATUTES

Employee Retirement Income Act of 1974
("ERISA"), as amended § 29 U.S.C.
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No. 89-1568

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

ARTHUR CHAMBLESS and MILDRED H. CHAMBLESS,
Petitioners,

-against-

MASTERS, MATES & PILOTS PENSION PLAN, et
al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO A PETITION
FOR A WRIT OF CERTIORARI

Respondents, Masters, Mates &
Pilots Pension Plan, Stephen P. Maher, and

Masters, Mates & Pilots Pension Plan Trustees, oppose the petition for a writ of certiorari to review (1) the decision and judgment of the Court of Appeals for the Second Circuit entered in this case on September 12, 1989; and (2) the order of the Court of Appeals for the Second Circuit entered in this case on March 14, 1990.

STATEMENT OF THE CASE

The Masters, Mates & Pilots Pension Plan ("the Plan") is a multi-employer plan established to provide pension benefits to licensed deck officers who retire from sailing in the American Merchant Marine. Petitioner, Arthur Chambless ("Chambless") sailed as a member of the International Organization of

Masters, Mates & Pilots from 1944 until 1977.

In early April 1977, Chambless submitted an application for pension benefits. During the processing of that application, the Plan received information, subsequently confirmed by Chambless, that Chambless was working aboard a non-signatory vessel and therefore had not retired within the meaning of the Plan Regulations. Thereupon, the Plan notified Chambless that his application for pension benefits was denied because he had not retired within the meaning of the Plan Regulations and that because he continued to work for a non-signatory vessel he could not receive his pension under the Plan until

1986, when he reached his "normal retirement age" of 65 (A. 4).¹

Chambless and his wife brought this action alleging violations of ERISA and federal labor and anti-trust laws, seeking restitution of allegedly forfeited pension rights, damages for emotional distress and punitive damages. (A. 125) Many of petitioners' claims were dismissed following cross-motions for summary judgment. Chambless v. Masters, Mates & Pilots Pension Plan, 571 F. Supp. 1430 (S.D.N.Y. 1983) (Chambless I). At trial the balance of petitioners' causes of action were dismissed at the close of plaintiffs' case except for the issue of

¹References to pages in petitioners' appendix for certiorari are designated as (A.) and references to pages in the Joint Appendix filed in the Court of Appeals are designated as (AA.).

whether the Plan Trustees had violated ERISA when they caused Chambless to forfeit his pension until age 65. (A. 5)

In its decision after trial, the District Court found that the Plan's decision to defer Chambless' pension until he reached age 65 was improper. The Trustees were directed to approve Chambless' application for a pension "provided he ceases working in the maritime industry," and to "treat the application, for the purpose of calculating his wage-related pension, as if it had been made in 1977, thereby granting him a wage-related pension based on his 1967-1977 employment record" (A. 119) Chambless v. Master, Mates & Pilots Pension Plan 602 F.Supp. 904 (S.D.N.Y. 1984) (Chambless II).

By endorsement order dated November 30, 1984, the District Court stated that its opinion "did not contemplate pension benefits for Captain Chambless retroactive to 1977", and further stated that if the case was appealed, "plaintiff would be advised to raise those questions on appeal". (A. 115-116)

The Court of Appeals for the Second Circuit, noting that Chambless was contending that "the district court erred by not awarding Chambless benefits retroactive to May 1, 1977" (A. 103), affirmed the decision of the District Court in all respects holding, inter alia, that "the district court was correct in not awarding retroactive benefits" but instead requiring the Plan to pay Chambless, commencing with his retirement

the monthly amount he would have received had he retired in 1977 and remanded to the District Court "for a determination of the benefits which Chambless would have received in 1977" (A. 112-114), Chambless v. Masters, Mates & Pilots Pension Plan, 772 F.2d 1032 (2d Cir., 1985) (Chambless III).

On February 24, 1986 this Court denied Chambless' petition for a writ of certiorari, 475 U.S. 1012 (1986).

Thereafter, Chambless moved in the District Court for an order amending the judgment to award him the actuarial equivalent of pension benefits retroactive to May 1, 1977. (AA. 265) That motion was denied by an endorsement order dated April 22, 1986. (A. 92)

Chambless' attorney also applied at that time for an award of attorneys'

fees against the Plan pursuant to §502(g) of ERISA, 29 U.S.C. §1132(g). In a decision dated June 23, 1986, the District Court denied the fee application on the ground that Chambless had unreasonably protracted the proceedings in this case. (A. 85) The Court of Appeals affirmed in part and reversed in part, holding that Chambless should receive "a reasonable fee for the time spent on [his] vindicated ERISA claim." (A. 83)

At the same time, the Court of Appeals affirmed the District Court's decision denying Chambless' motion to amend the judgment, permitting Chambless, on remand, to present to the District Court any claim that his monthly pension benefit "fails to include required cost-of-living adjustments and related claims that he is not receiving or has not

received, the monetary benefits to which he is entitled under the Plan" (A. 84), Chambless v. Masters, Mates & Pilots Pension Plan, 815 F.2d 869 (2d Cir. 1987) (Chambless IV). The Second Circuit did not, however, disturb the holding in Chambless II that Chambless was not entitled to retroactive benefits, and remanded to the District Court to calculate arithmetically Chambless' pension benefits pursuant to its decision in Chambless II.

Thereafter, Chambless proceeded to file a fee application and in a decision dated July 20, 1988 (A. 44) the District Court awarded Chambless \$416,191.30 in attorneys' fees. The District Court also awarded Chambless an "actuarial adjustment" of his monthly pension benefit. (A. 71) Both parties moved for

reargument and in addition, Chambless filed a supplemental application for attorneys' fees, costs and expenses for the period April 25, 1987 through August 1, 1988. In a decision dated September 16, 1988 (A. 28), the District Court denied the motions for reconsideration and granted, in part, Chambless' supplemental fee application awarding him an adjusted fee award of \$451,990.50. (A. 42)

Still not satisfied with the award of counsel fees, Chambless again appealed to the Court of Appeals claiming, inter alia, that the award was inadequate. The Plan also appealed from the July 20, 1988 decision and the amended judgment which awarded Chambless an "actuarial adjustment" of his monthly pension benefit.

In a decision dated September 12, 1989 (A. 1) reported as Chambless v. Masters, Mates & Pilots Pension Plan, 885 F.2d 1053 (2d Cir. 1989) (Chambless V) the Court of Appeals reversed the award of actuarially adjusted pension benefits (A. 11) and affirmed the decision on plaintiff's attorneys' fees (A. 22), except to the extent of remanding the award of paralegal fees to the District Court to be determined in accord with the decision of Missouri v. Jenkins ____U.S.____, 109 S.Ct. 2463 (1989). (A. 13) In that branch of its decision reversing the District Court's award of an "actuarial adjustment", the Court of Appeals, noting that the District Court had recognized "the undisputed fact" that Chambless may not receive retroactive benefits, commented that the District

Court had nonetheless "awarded the economic equivalent, labeling it 'actuarial adjustment' rather than 'retroactive benefit' as if the two were distinct, like apples and oranges". (A. 9)

In affirming the District Court's fee award, the Court of Appeals rejected petitioner's request for fee parity with respondents' counsel and held that petitioners' rates should be comparable with those charged by small to middle size firms, not large firms.

ARGUMENT

This case is inappropriate for review on a writ of certiorari. Because no important questions under ERISA or any other statute are presented and the decision of the Court of Appeals does not conflict with the decisions of this Court

or of the other federal courts of appeals, review by this Court is unwarranted. There are no special and important reasons for granting the petition.

To the contrary, the first issue raised in the petition involving whether Chambless is entitled to a "remedy of an actuarial adjustment" is nothing more than a veiled attempt to resurrect arguments that have been correctly rejected by the Court of Appeals (A. 112-113) as representing retroactive benefits which have been consistently held (including by the District Court) that Chambless is not entitled to receive. Indeed this Court has previously denied Chambless' prior petition for a writ of certiorari when petitioner raised this very same issue. 475 U.S. 1012 (1986).

Moreover, the fee awarded to Chambless' counsel is consistent with the prior decisions of this Court and the standards set in those cases were properly applied in this case.)

I. THE "REMEDY OF AN ACTUARIAL ADJUSTMENT" REQUESTED BY CHAMBLESS IS THE EQUIVALENT OF A RETROACTIVE BENEFIT WHICH BOTH THE DISTRICT COURT AND THE COURT OF APPEALS HAVE HELD CHAMBLESS CANNOT RECOVER

Petitioner seeks to convince this Court that he is presenting an "issue of first impression" and that Chambless' benefit had not previously been determined. This is not so; a matter of "first impression" has not been raised by petitioner and no issue of improper appellate review exists as claimed by petitioner as the prolonged history of this matter demonstrates.

In Chambless II the District Court directed the Trustees to approve Chambless' application for retirement when he ceased working aboard a vessel in the maritime industry. The District Court further provided that upon his retirement Chambless should receive a pension calculated on the basis of his 1967-1977 employment record. (A. 119) The Court of Appeals affirmed the decision that Chambless was not entitled to pension benefits retroactive to 1977 because Chambless had not withdrawn from employment aboard a vessel and thus had not retired within the Plan's lawful retirement-defined rule. (A. 112-113) The Court of Appeals held "that the District Court was correct in not awarding retroactive benefits but instead requiring the Plan to pay Chambless, upon his

retirement, the monthly amount he would have received had he retired in 1977". (A. 112-113)

The District Court reiterated its position that Chambless was not entitled to retroactive benefits when it observed in its July 20, 1988 decision, "this court and the Court of Appeals have unequivocally disallowed" Chambless' claim for retroactive benefits. (A. 69)

The Court of Appeals conclusion in Chambless III that Chambless cannot receive retroactive benefits was binding on the District Court and the subsequent Court of Appeals panel. Dorsey v. Continental Casualty Co. 730 F.2d 675, 678 (11th Cir. 1984); Doe v. New York City Department of Social Services 709 F.2d 782, 789 (2d Cir.), cert. denied 464 U.S. 864 (1983). The Court of Appeals in its

decision as to which petitioner seeks review by this Court (Chambless V), recognized that it was required to "adhere to the earlier panel's ruling: . . . The clarity of our prior holding in Chambless III speaks for itself: 'The District Court was correct in not awarding retroactive benefits, but instead requiring the Plan to pay Chambless, upon his retirement the monthly amount he would have received had he retired in 1977'". (A. 9) (Emphasis in original)

Chambless' petition contends that the refusal of the Court of Appeals to "defer" to the purported findings and decision of the District Court that Chambless was entitled to an actuarial adjustment of his pension benefits runs contrary to the "clearly erroneous" standard of review, and cites to a line of

cases including Inwood Laboratories v. Ives Laboratories 456 U.S. 844, 102 S.Ct. 2182 (1982); Chapman v. National Aeronautics Space Administration 736 F.2d 238 (5th Cir.) cert. denied 469 U.S. 1038, 105 S.Ct 51 (1984); Pullman-Standard v. Swint 456 U.S. 273, 102 S.Ct 1781 (1982); Zenith Radio Corp. v. Hazeltine Research, Inc. 395 U.S. 100, 89 S.Ct. 1562 (1969).

These cases stand for the proposition that the appellate courts are bound by the clearly erroneous standard of Rule 52(a), Federal Rules of Civil Procedure, but that rule has no application to the decision of the Court of Appeals as to which the petitioner seeks a writ of certiorari because the facts and the law of the case as established by the District Court and affirmed by the Court of Appeals was that

Chambless (Chambless II) was not entitled to retroactive benefits.

The Court of Appeals has now properly held that the District Court by awarding an actuarial adjustment erroneously believed that because Chambless would be paid over a shorter period of time, the amount of each payment should be increased. What Chambless' argument overlooks and what the District Court failed to recognize is that Chambless did not retire until 1986 and was not eligible for pension benefits before he retired. This was the basis for the Court of Appeals rationale in denying plaintiff's retroactive payments for the years 1977-1986. (A. 10)

The Plan Regulations governing the calculation of pension provides no basis for recalculating the monthly pension

amount to provide an actuarially equivalent lifetime benefit merely because a participant like Chambless postpones his retirement date. The Plan has the right to require Chambless to retire in order to receive a pension, a right that was upheld by the Court of Appeals in Chambless III and in Riley v. MEBA Pension Trust 570 F.2d 406 (2d Cir. 1977).

The Court of Appeals decision that "payments that in any way compensate Chambless for the years 1977-1986" (prior to his retirement in 1986) are thus retroactive benefits "regardless of how they are labeled" was consistent with all prior rulings in the case and provides no basis for review by this Court. (A. 10-11) (Emphasis in original)

Moreover, the lack of merit to petitioners' claims is further

demonstrated by petitioners' erroneous description as an "issue of first impression", the question as to whether "a district court has discretion to require an actuarial adjustment of a pension benefit in order to avoid a confiscation and to remedy discriminatory conduct

. . . ." (Petitioners' brief pp. 14-15)
Both the District Court and the Court of Appeals have held that postponement of retirement benefits until age 65 does not constitute an unlawful forfeiture violative of ERISA (A. 109). And this Court has previously denied Chambless' prior petition for a writ of certiorari after the Court of Appeals has so decided.
475 U.S. 1012 (1986).

II. THE COURT OF APPEALS CORRECTLY DETERMINED THE FEE AWARD TO PETITIONERS BASED ON THE RATES OF SMALL TO MEDIUM SIZED FIRMS AND WAS NOT REQUIRED BY THIS COURT'S PRIOR DECISIONS TO PROVIDE PETITIONERS' COUNSEL WITH "FEE PARITY" WITH RESPONDENTS' COUNSEL

Chambless now seeks an increase in the legal fees awarded by the District Court. He claims that the award of fees is insufficient because the District Court based its award on the fees payable to small and medium sized firms and did not base its award on a theory of fee parity, i.e., that his attorney should be paid by the respondents at the same hourly rates that respondents paid to their own attorneys defending the claim. Chambless also claims that the District Court incorrectly failed to award him interest on the fee award to compensate for the delay in payment.

This branch of Chambless application is similarly inappropriate for review on a writ of certiorari. There are no important ERISA or other federal questions presented and the decision of the Court of Appeals affirming the decision of the District Court does not conflict with the decisions of this Court or of the other federal courts of appeal.

In reaching its decision awarding Chambless fees, the District Court, noting that his submissions establish "merely an undifferentiated range of rates billed by large New York firms" and had not explained "how those rates vary according to skill, type of litigation, size of firm or services rendered" rejected petitioner's claim that his fees should be based on those of large firms and used its own "knowledge and expertise" in place of

the evidence Chambless "could have provided". (A. 59) The Court further noted that Chambless' counsel had not even provided its own affidavits, setting forth their own billing rates during the pendency of the litigation. In order to avoid the imbalances provided by using historical or current rates, the Court, following the compromise adopted in the Second Circuit, thereupon divided the litigation into two phases, using one rate for the early phase and a current rate for the later phase. (A. 60)

On reargument, the Court rejected petitioner's request for interest on the award, noting that by its prior decision petitioner had been "amply compensated for all delay". (A. 33) The Court again rejected petitioner's insistence that he was entitled to "fee parity", denying

petitioner's claim that his attorney is entitled to comparable rates to those charged by opposing counsel.

The Court of Appeals, in affirming, also rejected petitioner's claims that it was improper to calculate rates based on small to middle size firms and that there should be "fee parity". The Court also accepted the District Court's view that it had properly compensated petitioner's attorney for delay in payment.

"Reasonable hours" multiplied by a "reasonable rate" provides a "reasonable" attorney's fee within the meaning of the statute. "Reasonable fees" are to be calculated "according to the prevailing market rates in the relevant community". Blum v. Stenson, 485 U.S. 886, 895, 104 S.Ct. 1541 (1984); Hensley v. Eckerhart,

461 U.S. 424, 103 S.Ct. 1933 (1983). As further set forth in Blum v. Stenson, 485 U.S. at p. 896, n. 11 (and quoted by the Court of Appeals in rejecting petitioner's claims) "the burden is on the petitioner to demonstrate that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation". Thus several market rates may prevail in a given area, particularly such as New York City.

To do otherwise, as petitioner urges, and to utilize, in particular, the so-called "fee parity" approach demanded by petitioner would be wholly without rational basis and contrary to the purposes of the fee shifting statutes. Thus, there is no conflict with Blum v. Stenson or Hensley v. Eckerhart, supra.

It is the prevailing party - not his attorney - who is eligible for a discretionary award of attorneys' fees. Venegas v. Mitchell, 58 U.S.L.W. 4462 (April 17, 1990); Evans v. Jeff D., 475 U.S. 717, 730 (1986). The aim is to provide plaintiffs, if they prevail, with "an attorneys' fee that Congress anticipated would enable them to secure reasonably competent counsel." Venegas v. Mitchell, Id., at p. 4464.

However, the fee shifting statutes are not designed to produce "windfalls" for attorneys, precisely the result that would be obtained if petitioner's theories were to be accepted. As this Court stated in Pennsylvania v. Del. Valley Citizens Council, 478 U.S. 546, 565, 106 S.Ct. 3088 (1986):

"These statutes were not designed as a form of economic relief to improve the

financial lot of attorneys, nor were they intended to replicate exactly the fee an attorney could earn through a private fee arrangement with his client. Instead, the aim of such statutes was to enable private parties to obtain legal help in seeking redress for injuries resulting from the actual or threatened violation of specific federal laws. Hence, if plaintiffs . . . find it possible to engage a lawyer based on the statutory assurance that he will be paid a 'reasonable fee', the purpose behind the fee-shifting statute has been satisfied."

To award Chambless an attorneys' fee in a sum as much as was paid to respondents' attorneys would be a "windfall" to Chambless' attorney. Although Chambless' attorneys had not provided affidavits setting forth their own billing rates during the pendency of the litigation, it may safely be concluded by such omission and the rates requested that his attorneys' "prevailing rates" as a small or medium size firm have always been substantially lower than that charged

by the "large" firms. Since Chambless attorney's rates for other clients who paid directly were customarily substantially lower than those of respondents' attorneys, it is clear that the fees now sought by Chambless for attorneys' fees pursuant to his fee parity theory is a classic "windfall". If he cannot charge "big" firm rates to his own direct paying clients, then fees in the nature of those sought by Chambless would, in effect, be punitive as against respondents, and there is no evidence that Congress sought to achieve any such objective. Indeed, the contrary is true. Venegas v. Mitchell at p. 4464.

Moreover, there are other reasons for differentiating between a small or medium size firm and a large firm in computing "reasonable" attorneys' fees

payable pursuant to a fee shifting statute. As pointed out by the Court of Appeals, the difference in the precedential value of the case to the respective parties will almost certainly vary markedly, thereby justifying a divergence in the fees charged. And there can be no question that the expenses of large firms are substantially higher than those paid by small to medium firms.

In addition, while Chambless claims there is a conflict in Circuit Court opinions with respect to use of attorneys' fees of the opposing party to compute plaintiff's award, the opinions cited by petitioner (Petitioner's brief, p. 51) are from the same Circuit. Discovery in Henson v. Columbus Bank & Trust Co., 770 F.2d 1566 (11th Cir. 1985) was permitted because there was doubt

expressed by the District Court as to the reasonableness of the hours claimed to have been expended by plaintiff's attorneys therein. In both of those cases cited by petitioners, the issue was not rates, but the number of hours worked.

Furthermore, Chambless' complaint respecting calculation of the fees of his attorney is without merit. In fact, the court awarded Chambless' attorney \$175.00 per hour for work performed during Phase I of the litigation (1979-1982) and \$200.00 per hour for work performed during Phase II (1983-1987). (AA. 969) These rates were higher than the rates requested in the fee application for work performed from 1979 to 1981 and 1983 to 1985. The rate awarded for 1982 was the rate requested in the fee application. (AA. 541-542)

Finally, Chambless claims that he is entitled to a larger award of attorneys' fees by reason of the fact that an insurance company paid respondents' attorneys' fees. In this connection, he incorrectly claims that defendants were able to pursue their alleged "tactics of litigation by attrition", while "secure in the knowledge that their attorney's fees and expenses would be covered by an insurance policy." (Petitioners' brief, p. 47)

This is factually untrue. The accusations ignore the fact that Sokolowski v. Aetna Life & Casualty Co., 670 F.Supp. 1199 (S.D.N.Y., 1987) (which established the insurance company's liability) was not even decided until 1987 - more than three years after the conclusion of the trial in this case.

Thus the contention by Chambless that the Plan was "secure in the knowledge" that the insurance company would pay their fees is truly outrageous.

Nor is there any relationship between the standards used to determine the Plan's recovery under its insurance policy in Sokolowski and the standards used to determine Chambless' attorneys' fees under ERISA. The attorneys' fees and litigation expenses the Plan recovered from the insurance company were based on a contractual obligation to defend the action and indemnify the Plan defendants. See Sokolowski, supra at p. 1210. Chambless' fee recovery, on the other hand, is governed by Section 502(g) of ERISA which "does not mandate equal fees for opposing counsel. (A. 15)

Thus for example, the Court of Appeals has previously held that Chambless is not entitled to recover fees for time expended on the frivolous and vexatious claims pursued in this case. Under the Plan's insurance policy, however, the Plan was entitled to recover from the insurance company all of its expenses incurred in defending this action - including the attorneys' fees incurred in defending against Chambless' frivolous claims.

Finally, there is no basis for petitioner's claim for interest on the award or for a separate award of legal fees on petitioner's appeal. With respect to the latter, although petitioner refers to such claim (Petitioner's brief, p. 2), nowhere in his brief does he present any arguments in support of such award and has presumably waived the claim. With respect

to petitioner's claim for interest on the fees award in order to compensate for delayed payment, the District Court on reargument directed petitioner's attention to the fact that the hourly rates awarded in the July 20, 1988 decision were "sufficiently generous. . . to ensure that plaintiff will be amply compensated for all delay". (A. 33). Moreover it is, of course, the District Court Judge who has the best opportunity to determine the amount to be awarded for a reasonable fee and his calculation of attorneys' fees will not be disturbed absent an abuse of discretion (Hensley v. Eckerhart, 461 U.S. at 437; Evans v. Jeff 475 U.S. at 730; Venegas v. Mitchell, 58 U.S.L.W. at 4464. No such abuse has been demonstrated here, nor even if, arguendo, there were a real issue as to whether there was, would such

issue be the appropriate basis for the grant by this Court for a writ of certiorari. Moreover, Chambless' complaint concerning delay in recovering payment overlooks the fact that this case would have been completed in far less time but for the manner in which he prosecuted it. "Discovery would have been limited to ERISA issues. The only defendants . . . would have been those now remaining . . . and the fees and expenses would have been far short of the [amount] now being sought." (A. 87)

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: New York, New York
May 9, 1990

Respectfully submitted,

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